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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DERBY ASSOCIATES, A PARTNERSHIP OF THE STATE OF NEW JERSEY

Petitioner,

v.

SEASHORE CLUB CONDOMINIUM ASSOCIATION, INC., A CORPORATION OF THE STATE OF NEW JERSEY; THE BOARD OF TRUSTEES OF SEASHORE CONDOMINIUM ASSOCIATION, INC., AND GNOC CORP. t/a GOLDEN NUGGET, A CORPORATION OF THE STATE OF NEW JERSEY, GOLDEN NUGGET, INC., j/s/a

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT/APPELLATE DIVISION OF THE STATE OF NEW JERSEY

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44 PP

QUESTIONS PRESENTED

Whether individual condominium owners, who previously bargained for and acquired traditional fee simple interests in property in which was conferred an absolute power of disposition by contract and statute, are constitutionally protected against a subsequent amendment to the New Jersey Condominium Act which now empowers a majority of other condominium owners to disregard a dissenting minority and compel the dissolution and sale by all condominium owners of the fee simple interests previously obtained by contract.

PARTIES TO THE PROCEEDINGS

Petitioner, Derby Associates ("Derby"), is a partnership of the State of New Jersey which bargained for and obtained a fee simple interest pursuant to a contract negotiated and executed in February of 1984 in condominium Unit No. 215-B in the Seashore Club Condominums ("Seashore Club"), a condominium complex of 100 units situated at Boston Avenue and the Boardwalk in the City of Atlantic City.

Respondent, GNOC Corp. t/a Golden Nugget ("Nugget"), is a corporation of the State of New Jersey which operates a hotel/casino in close proximity to the Seashore Club. Respondent, Seashore Club Condominium Association, Inc. ("the Association"), is an entity composed of all unit owners organized pursuant to N.J.S.A. 46:8B-1 *et seq*. ("the Condominium Act"). Respondent, the Board of Trustees of Seashore Condominium Association, Inc. (the "Board"), is the Association's governing body, also organized pursuant to the Condominium Act.

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Petitioner, Derby Associates, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Jersey Superior Court/Appellate Division entered in these proceedings on June 18, 1986 affirming the judgment and opinion of the New Jersey Superior Court/Chancery Division entered in the above matter on May 14, 1985.

OPINIONS BELOW

The denial of Certification of the Supreme Court of the State of New Jersey is, as yet, unpublished and is reprinted in the appendix hereto ("App.") at la.

The opinion of the Superior Court/Appellate Division is reprinted at App. 2a.

The opinion of the Superior Court/Chancery Division is presently unreported and is reprinted at App. 3a.

The Order of the Superior Court/Chancery Division is represented at App. 4a

JURISDICTION

On February 4, 1985, Petitioner filed a Verified Complaint and Order to Show Cause with the Superior Court/Chancery Division alleging as unconstitutional the retroactive effect of Public Law 1985 C. 3 which amended N.J.S.A. 46:8B-26 to the end that condominium property could be removed from the provisions of the Condominium Act by agreement of at least 80% of the members of the Association. This amendment effected a significant dilution of the previous statutory requirement of complete unanimity among the members of the Association on the issues of removal and termination of the condominium entity. Petitioner also requested an injunction precluding any actions of the Association purportedly under the aegis of the amendment.

Respondent filed an answer and cross/moved for a declaration that the retroactive effect of the amendment was constitutional. On May 14, 1985 an Order and Judgment was entered by the Superior Court/Chancery Division declaring that the retroactive effect of the statute was constitutional; hence, Petitioner's application for restraints was denied. (App. 4a.)

Petitioner appealed this disposition to the Superior Court/Appellate Division by way of a Notice of Appeal dated June 26, 1985. On June 18, 1986 the Superior Court/Appellate Division issued its opinion affirming the judgment of the Superior Court/Chancery Division (App. 2a.)

Petitioner then filed a Notice of Petition for Certification with the Supreme Court of the State of New Jersey on July 17, 1986. This petition was denied on October 7, 1986. (App. 1a.)

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10 of the United States Constitution forbids a State from enacting any "Law impairing the Obligation of Contracts." This Article is paralleled by Article IV, Section 8, Paragraph 3 of the New Jersey State Constitution.

N.J.S.A. 46:8B-26 was amended on January 8, 1985. Until that date it held that a condominium property could be removed from the provisions of the Condominium Act by unanimous agreement of all the unit owners in the Association. The amended language of the statute now reads that removal may be accomplished by agreement of at least 80% of the votes of the unit owners. It is the expressly retroactive application of the amendment that has elicited Petitioner's constitutional challenge.

STATEMENT OF THE CASE

Petitioner, Derby Associates ("Derby"), is a partnership of the State of New Jersey. On June 1, 1984, the partnership went to settlement and obtained a fee interest pursuant to a contract negotiated and executed in February of 1984 in condominium unit number 215-B in the Seashore Club Condominiums ("Seashore"), a condominium complex of 100 units situated at Boston Avenue and the Boardwalk in the City of Atlantic City. The condominium complex is located in close proximity to the Respondent, Golden Nugget Casino ("Nugget").

By virtue of this fee ownership, Petitioner became associated with the Seashore Club Condominiums Association, Inc. ("the Association"), an entity representing all owners pursuant to N.J.S.A. 46:8B-1 *et seq*. ("The Condominium Act").

At the time Petitioner obtained its fee interest, condominium ownership throughout the State of New Jersey was comprehensively governed by the provisions of the Condominium Act. At the time of its purchase of Unit 215-B, Petitioner relied upon the prescription of rights set forth in that legislative scheme: (a) N.J.S.A. 46:8B-3q defined a unit owner as the holder of a fee simple interest; (b) N.J.S.A. 46:8B-4 indicated that each unit constituted a separate parcel of real property subject to the same use that any owner could make of any other separate parcel; and (c) N.J.S.A. 46:8B-26 required unanimity between all owners of condominium units as a condition to the termination of the condominium complex and conversion of the separate fee interests into joint tenancies in common subject to partition sale. Hence, the controlling statute conferred on an owner of a condominium unit absolute power over the ultimate disposition of his property.

During the summer of 1984 Respondent Nugget formulated the intention to purchase the entire Seashore Club Condominium for the ultimate purpose of demolition and expansion of its existing casino facilities and/or the construction of a surface parking lot. To accomplish this goal Respondent initiated a vigorous campaign intended to induce the various members of the Association to sell their units. The strategy adopted by the Nugget entailed the offer of "over-market" prices for the units; sellers were cautioned, however, that the offers would continue only if all unit owners agreed to sell. The unit owners were also advised by a letter authored by Alfred Luciani, Nugget Vice President, that having previously acquired some of the units, Nugget would exercise the absolute power it had thus acquired over the disposition of its own property to veto and block any effort to sell the complex to a developer other than the Nugget. As a result, considerable pressure to sell to the Nugget was generated against the remaining unit owners.

From July of 1984 through September 1984 a majority of the condominium owners entered agreements of sale with the Nugget and proceeded to settlement. Hence, Nugget succeeded to the status of a substantial member of the Association. During this

time the Association authorized a series of actions, including litigation, to be taken against dissenting unit owners who did not agree to sell their property to the Nugget.

Nugget made persistent efforts to induce Petitioner to relinquish its fee interest and sell its property throughout the summer and fall of 1984. At meetings conducted during this period, and with particular emphasis at a pivotal meeting conducted on September 13, 1984, representatives of Petitioner indicated to representatives of Respondent that the offers to purchase were not commensurate with the substantial value of the fee interest and incidental rights. Representatives of Petitioner further emphasized that it would not be coerced into relinquishing its fee interest and related rights by efforts at intimidation or any course of illegal action.

Thereafter, at the instigation of counsel for Nugget, Senate Bill No. 2141 was introduced by State Senator Russo on September 13, 1984. This bill was designed to amend N.J.S.A. 46:8B-26 to the end that condominium property could be removed from the provisions of the Condominium Act by agreement of at least 80% of such voters. This amendment effected a significant dilution of the previous statutory requirement of complete unanimity among the members of the Association on the issues of removal and termination. The law was made expressly retroactive in application. The history of the process by which this amendatory legislation was procured first surfaced in news articles published after the commencement of this litigation. Nugget's counsel has never denied these allegations; rather, he has, during argument, repeatedly acknowledged their accuracy.

The enaction of the amendment was vigorously promoted during the fall of 1984 during which time the Petitioner consistently resisted the efforts by Nugget and the Association to illegally undermine its fee interest. On November 19, 1984 the bill was passed by the Senate; it was passed by the New Jersey Assembly on December 17, 1984, and became effective on January 8, 1985, by the signing of the Governor.

The Verified Complaint and Order to Show Cause initiating the present litigation were filed on February 4, 1985, following notice of the new legislation. Following the dispositions cited

above, Nugget compelled a partition of the condominium facility which forced petitioner to sell its property pursuant to a forced sale.

REASONS FOR GRANTING THE WRIT

I. THE RETROACTIVE APPLICATION OF THE AMENDMENT TO N.J.S.A. 46:8B-26 VIOLATES THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION.

The central question in this matter is whether owners of condominium properties, who have bargained for and acquired fee simple interests over which an absolute power of disposition was expressly conferred by statute and contract, are constitutionally protected from subsequent amendatory legislation which empowers a majority of other owners to force dissolution of the condominium and the loss of all fee simple interests through partition sale. To the extent that the challenged legislation does not modify a specific particular of a contract, but operates to wholly and irrevocably extinguish the entirety of these real property interests, it violates U.S. Const., Art. I, §10 which forbids the enforcement of any law which impairs the obligation of contracts.

A. PETITIONER OBTAINED TRADITIONAL FEE SIMPLE INTERESTS PURSUANT TO THE BARGAIN BY WHICH ITS CONDOMINIUM UNIT WAS PURCHASED

When the Petitioner entered the condominium market the interests subject to the bargain were explicitly prescribed by statute: (a) N.J.S.A. 46:8B-3q defined a "unit owner" as a person owning a unit in *fee simple;* (b) N.J.S.A. 46:8B-4 further specified that each unit constituted a "separate parcel of real property" which could be dealt with by the owner in the same manner permitted by law for any other parcel or real property; and (c) N.J.S.A. 46:8B-26 prescribed the execution of a deed of revocation by *all* unit owners as the exclusive means by which this parcel of real property could be removed from the protections and warranties of the Condominium Act. Hence, a prospective

purchaser was put on notice that the consideration he offered in the bargain would bring him, and, as well, his fellow unit owners, a fee simple interest which could not be divested or converted without his consent. These were the terms and dynamics of the bargain entered into not only by Petitioner, but by every other unit owner as well, including the Nugget.

In *AMN v. So. Bruns. Tp. Rent Leveling Bd.*, 93 N.J. 518, 528 (1983) the New Jersey Supreme court defined the property interests obtained by condominium owners in the following terms:

> "The courts of New Jersey have recognized the legislative intent expressed in the Condominium Act and have held that each condominium unit is to be treated under N.J.S.A. 54:4-3.6 (exempting property of nonprofit organizations from taxation) as an exclusive and separate unit for tax exemption purposes. *Perth Amboy General Hospital v. Perth Amboy*, 176 N.J. Super. 307, 313 (App.Div. 1980). Similarly, it has been held that condominiums are separate parcels of real property for real estate licensing requirements. *Zaid v. Island House Condominium Association*, 170 N.J. Super. 206 (Ch.Div. 1979). '*Indeed, the Condominium Act makes it clear that a unit owner has the same unfettered ownership interest in his unit as any other owner of real property does in his property. . . .*' *Id.* at 209." *Id.* at 528. (Emphasis provided).

and further:

> The New Jersey Legislature recognized these conflicting policies and has attempted to balance the interests of condominium owners and the interest of tenants. *On one hand, the Legislature has provided that each condominium unit shall constitute a separate and distinct parcel of real property and each owner will be treated as the owner of a one-family house*. On the other hand, the preconversion tenants are protected from immediate eviction. 21. *Id.* at 530. (Emphasis provided).

The New Jersey Supreme Court concluded that "the Legislature clearly intended that condominium owners be accorded generally the same rights and privileges as owners of separate and independent parcels of real property." *Id.* at 529.

Clearly, a condominium owner who obtained his fee simple interests prior to the effective date of the amendment of N.J.S.A. 46:8B-26 bargained for and received, like his neighboring owner of a one-family house, absolute control over his property interests. That this is so is clear from the conduct of Respondent's Vice-President, Alfred Luciani, who, in a letter dated June 26, 1984, indicated to the individual members of the Association that Nugget's absolute right of disposition of the property Nugget had previously acquired would be exercised in its narrow self-interest by vetoing and blocking any effort by the other members of the Association to sell the facility to a competing developer: "[Golden Nugget] having acquired a number of the units will never permit the development of the Seashore Club East property unless it is a Golden Nugget development or unless we approve of the proposal. To be honest, it is not likely that we would approve another's development since, because of the cost of the property, a high-rise structure would be required and such a building would block the views of the ocean from Golden Nugget's hotel tower." At the time of this letter Nugget was not a majority owner of the units in the Association, but was obviously relying on those absolute incidents of ownership obtained by way of bargain and sale and warrantied by the terms of the Condominium Act which Petitioner seeks to vindicate before this Court.

The interests obtained by vendees in real property transactions have traditionally been afforded substantial protections by the courts of New Jersey. As noted in *Centex Homes Corp. v. Boag,* 128 N.J. Super. 385, 389 (Ch.Div. 1974), the jurisprudence of specific performance arose precisely because of the historic perception that interests acquired by vendees were unique and not readily translatable into pecuniary value:

> The principle underlying the specific performance remedy is equity's jurisdiction to grant relief where the damage

> remedy at law is inadequate. The text writers generally agree that at the time this branch of equity jurisdiction was evolving in England, the *presumed uniqueness* of land as well as its importance to the social order of that era led to the conclusion that damages at law could *never* be adequate to compensate for the breach of a contract to transfer an interest in land. Hence specific performance became a fixed remedy in this class of transactions. (Emphasis provided)[1]

See also, "Specific Performance", 81 C.J.S. §76, p. 885.

New Jersey Courts have consistently protected the integrity of bargains whereby vendees obtain fee interests in real property:

> This Court has already herein indicated that it cannot compel the purchaser to accept and pay for something different than that which he bargained for and which the defendant agreed to convey. To do so would in effect be a vital change in the agreement. It is not the function of this Court to make a new and different one for the parties. *Burns Trading Corp. v. Blue Front Market*, 17 N.J. Super. 61, (L.Div. 1951)

See also *McVoy v. Baumann*, 93 N.J. Eq. 638, 643 (E&A 1922). Nugget clearly relied on the effectiveness of *its* bargain when the Luciani letter was sent. It was only after Nugget acceded to a majority position in the Association and the Petitioner persisted in its refusal to sell its unit that Nugget invoked the notion of "fairness" in its procurement of the challenged amendment.

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1. The *Centex* court ultimately held that a vendor of a condominium unit was not entitled to the same equitable remedy as a vendee. The court held that a vendor, seeking to sell multiple units, could not claim a sufficiently unique interest in a single unit so as to justify a decree of specific performance against a defaulting purchaser. Stated differently, the vendor's interest in a single unit, as distinct from a vendee's interest, is adequately redressed by way of money damages.

B. THE NULLIFICATION OF PETITIONER'S PROPERTY INTERESTS ACHIEVED BY THE RETROACTIVE APPLICATION OF THE AMENDMENT TO N.J.S.A. 46:8B-26 VIOLATES ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION (THE CONTRACT CLAUSE).

The modern line of cases addressing statutory modifications of private contractual rights was precipitated by legislative efforts to respond to the catastrophic effects of the great depression. In *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), the Minnesota legislature enacted a statute designed to provide temporary relief to mortgagors by postponing foreclosure sales and extending periods of redemption. While acknowledging that the State had reserved police powers sufficient to affect private contractual rights in narrowly prescribed circumstances, the Supreme Court held that such authority must be construed in harmony with the Contract Clause:

> This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or *the destruction of contracts* or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. *Id.* at 439. (Emphasis provided).

Taking the relevant economic and historical factors into account, the Supreme Court held that the particular modification under review did not destroy contractual rights, but simply ordained a temporary deferral of their exercise. Because of the genuine public justification, and the minimal alterations of the contractual relationship, the legislation was deemed reasonable and constitutionally sufficient. The *Blaisdell* opinion engendered a line of cases in which the Supreme Court affirmed the power of legislatures to modify the particulars of private contractual arrangements when such modifications promoted genuine public

interests and were reasonable in their application. In other cases, however, the Court scrupulously observed that this legislative power was not unlimited and could not operate to nullify or wholly extinguish private contracts:

> We said [in Blaisdell] that the constitutional prohibition should not be so construed as to prevent limited and temporary interpositions with respect to the enforcement of the contracts if made necessary by a great public calamity such as fire, flood or earthquake, and that the State's protective power could not be said to be non-existent when the urgent public need demanding relief was produced by other and economic causes. But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, *and that this principle precluded a construction which permits the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them*. *W.B. Worthen Co. v. Thomas*, 292 U.S. 246 (1933). (Emphasis provided).

See also *W.B. Worthen Co. v. Kavanough*, 295 U.S. 56 (1935) (Justice Cardoza noted that there are constitutional bounds to the legislative authority even when the public welfare is invoked.); *Treigle v. Acme Homestead Assn.*, 297 U.S. 186 (1935) (The Court noted that "though the obligations of contract must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive." *Id.* at 1987.).

The principle to be distilled from these Depression era cases is that private contractual rights are not wholly immune to subsequent legislative alteration, but may be subject to reasonable modifications actuated by genuine public interest or need. There are constitutional limits, however, which are transgressed when laws operate to wholly destroy the contractual expectations bargained for by the parties or if the public interest is not commensurate with the impairment effected by the legislation. In

the present matter, the challenged amendment does not simply alter a given particular of a contract; rather, it enables Petitioner's neighbors to force Petitioner to sell its property, effectively and irrevocably extinguishing the totality of the benefits of the earlier sale transaction. As such, it violates the constitutional bar cited above.

The most recent United States Supreme Court case addressing these issues is *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983). In that case the Supreme Court reviewed the constitutional adequacy of legislation enacted by the Kansas Legislature which imposed lower price ceilings on natural gas than otherwise would have been charged under a prior long-term supply contract. The Court proposed a three part test to determine the constitutional adequacy of the legislation:

> (1) The State law must, in fact, operate as a substantial impairment of a contractual relationship.
>
> (2) The State must have a significant and legitimate public purpose behind the regulation.
>
> (3) The adjustment of the rights and responsibilities of the contracting parties must be reasonable and appropriate to the public purpose.

In determining the extent of impairment, the Court was especially concerned with the nature and scope of the plaintiff's fair contractual expectations. Of particular relevance to this issue was the explicit acknowledgment in the contracts that the price terms of the agreement were expressly subject to present and future state and federal law:

> This later provision could be interpreted to incorporate all future state price regulation and thus dispose of the Contract Clause claim.
>
> Regardless of whether this interpretation is correct, the provision does suggest ERG knew its contractual rights were

> subject to alteration by state price regulation. Price regulation was forseeable as the type of law that would alter contract obligations. *Id.* at 416.

Hence, there was no real defeat of a contractual expectation by a subsequent modification of price. The Court also noted that demonstrable and vital social interests were legitimately served, as in *Blaisdell:*

> To the extent, if any, the Kansas Act impairs ERG's contractual interests, the Kansas Act rests on, and is promoted by, significant and legitimate state interests. Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation. The State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes. *Id.* at 417.

As the Kansas statute was narrowly drafted, and a temporary measure in any event, the Court held that the relief met the third requirement of reasonableness under the prescribed analysis and was constitutionally sufficient. At the risk of repetition, the present legislation does not merely entail a brief and limited alteration of one particular of a long term contract, rather the amendment mandates a profound and unforeseen adjustment in the rights of the parties which ensures the dissolution of substantial real property interests.

The most meaningful language in terms of the present matter is found in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), decided by the United States Supreme Court several years before *Energy Reserves*. In this case the Court invalidated a Minnesota statute which imposed a pension plan on any employer closing operations who employed at least 100 employees, some of whom were employed for ten years. The importance of this decision lies not in any argued factual analogy to the present matter — *Spannaus* obviously represents a unusually focused exercise of the legislative authority — but in the Court's discussion of the concept of "proportionality":

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alterations of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. *Id*. at 245.

Clearly, the greater the contractual impairment, the more compelling and demonstrable must be the public interest served. Indeed, the concept of proportionality effectively means that not every impairment is justified simply by an identifiable public interest; rather, a balance between the two is necessary: as noted in *U.S. Trust Co. v. N.J.*, 431 U.S. 1, 21 (1977), "the Contract Clause limits otherwise legitimate exercises of State Legislative Authority, and the existence of an important public interest *is not always sufficient to overcome that limitation*." (Emphasis provided). The analysis, in essence, requires a weighing of the impairment and its justification. This is precisely the analysis mandated by relevant New Jersey law. *Rothman v. Rothman*, 65 N.J. 219 (1974); *Gibbons v. Gibbons*, 86 N.J. 515, 523 (1981).

In the present matter the Respondent has argued that the amendatory legislation is justified by considerations of "fairness", and represents modifications that bring the Condominium Act in harmony with the laws of other jurisdictions. The first contention is untrue; the second statement, while true, is meaningless in terms of providing an adequate justification for the destruction of Petitioner's property and contractual rights. The notion of fairness cannot reasonably be invoked when valuable incidents of property ownership, fairly bargained for and acquired, are retroactively extinguished. Respondent contends that it is unfair to impede the determination of the majority to dissolve the condominium and the amendment simply represents a salutary readjustment of the various rights of the condominium owners. Respondent is correct insofar as the amendment operates prospectively; there can be no objection if condominium owners have been put on notice *prior to acquisition* as to the limited extent of their property rights and the potential for forced divestment. In the present matter, however, all of the parties

bargained in accordance with the controlling law and acquired absolute rights of ownership and disposition over their respective properties; indeed, Nugget, as evidenced by the Luciani letter, sought to "veto" any hostile development of the site by exercise of its ownershp rights. It should be seen that the inability to affect the ownership interests of other unit owners is the necessary corollary to absolute control over the disposition of one's own property. This is another way of saying that when the parties entered the condominium market and bargained under the prior law for absolute control over their respective units, they relinquished in that bargain governed by that controlling law any ability to influence the disposition of other properties in the condominium complex. It was only after sufficient economic incentives were offered by Nugget that the impediments to affecting the disposition of other unit-owner's properties, embodied in and sanctioned by each unit owner's prior bargain under the controlling law, suddenly seemed onerous, unfair and appropriate for retroactive legislative remediation.

It is clearly not the interest of fairness, but individual and corporate acquisitiveness, that is served by retroactive application of the amendment. What the amendment accomplishes in real market terms is simply to make it easier for large affluent corporate entities, such as Nugget, to effect the dissolution and sale of condominium properties they covet. While elimination of impediments to private gain may be a legitimate policy objective in some contexts, it surely does not rise to the level of a genuine public interest justifying the retroactive extinction of substantial property and contractual rights.[2]

2. It is worth noting that the holding in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) is not to the contrary in respect to the issue of the public justification for legislative destruction of fee interests. In that case, this Court rejected a constitutional challenge to an Hawaiian statute authorizing the "taking" with compensation of titles to land owned by lessors and the transferring of these fees to occupying lessees. The Hawaiian legislature had concluded that this statutory mechanism would ameliorate the acute concentration of residential fee ownership derived from Hawaii's monarchical past. Describing as "unique" the extraordinary way in which the Hawaiian land market was skewed as a result of its peculiar history, this Court upheld the legislation holding that "[r]egulating oligopoly and the evils associated with it is a classic

CONCLUSION

This is not a case in which the proponents of impairment can document the existence of a broad social problem justifying the drastic remedy they espouse. The Depression era cases and the modern decisions clearly establish the existence of such a justification as essential to the validity of the impairment sought.

Rather than promotion of a general public good, this legislation is clearly designed to advance the private pecuniary interest of the few. To advance these narrow interests, the law operates to retroactively destroy, not merely modify, substantial opposing property rights that were warrantied by the prior law

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NOTES *(Continued)*

exercise of the State's police power." *Id* at 242.

The Hawaiian legislature was clearly addressing a deeply rooted and pervasive economic evil: a miniscule number of landowners held title to disproportionately extensive properties occupied by multiple residential lessees willing but unable to purchase the premises at fair market value. Hence, the market was profoundly distorted and parties living on single family lots would never have been able to purchase their residences without State intervention.

The present matter is not analogous. The Hawaiian legislature sought to eliminate enormous historical obstacles to single family ownership — a traditional and legitimate exercise of the legislative prerogative. The New Jersey legislation has no such beneficent objective; the ostensible purpose of the challenged amendment here is to "fine tune" the Condominium Act to make it easier to dissolve the condominium and force the sale of its various component interests. The underlying purpose is to facilitate private economic decisions motivated by the prospect of personal or corporate financial gain. To accomplish this private economic objective the retroactive application of the amendment radically and unfairly alters the incidents of ownership previously obtained by the parties: valuable rights of unit owners opposed to dissolution are destroyed, and the limited rights of owners favoring termination are enhanced. Yet all of the owners previously entered the condominium market on an equal basis and voluntarily bargained under the controlling law for an equal "bundle of rights" which included the absolute right of disposition of one's property and excluded the right to impair a neighbor's fee interest. There is simply no genuine and demonstrable historical, social or economic ill justifying the unfair reordering of these rights well after the bargains were struck; certainly there is no invocable justification of the kind and extremity underlying the Hawaiian legislation sustained by this Court in the *Midkiff* case.

and acquired by the process of bargain and sale. Rather than sanctioning such legislation, the controlling precedents establish requisites that are patently unfulfilled in the present matter.

For these reasons, this Court should grant the Writ and reverse the decision of the Court below.

Respectively submitted,

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APPENDIX

SUPREME COURT OF NEW JERSEY
C-159 SEPTEMBER TERM 1986

25,930

DERBY ASSOCIATES, etc , *Plaintiff-Petitioner,*	:	
vs.	:	ON PETITION FOR CERTIFICATION
SEASHORE CLUB CONDOMINIUM ASSOCIATION, INC., etc., et al, *Defendants-Respondents.*	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4809-84T7 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 6th day of October, 1986.

Clerk of the Supreme Court

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4809-84T7

DERBY ASSOCIATES, a partnership
of the State of New Jersey
Plaintiff-Appellant,

v.

SEASHORE CLUB CONDOMINIUM
ASSOCIATION, INC., a corporation
of the State of New Jersey; THE
BOARD OF TRUSTEES OF SEASHORE
CONDOMINIUM ASSOCIATION, INC.,
and GNOC CORP. t/a GOLDEN
NUGGET, a corporation of the
State of New Jersey, and GOLDEN
NUGGET, INC., a Nevada
Corporation, j/s/a,
Defendants-Respondents.

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Argued June 9, 1986 — Decided June 18,1986

Before Judges Morton I. Greenberg, J. H. Coleman and Long.

On appeal from the Superior Court, Chancery Division, Atlantic County.

Howard E. Drucks argued the cause for appellant (McGahn, Friss & Miller, attorneys; Mr. Drucks on the brief).

Martin L. Greenberg argued the cause for respondents (Greenberg, Margolis, Ziegler, Schwartz, Dratch & Fishman, attorneys; Mr. Greenberg, of counsel; Stephen M. Holden, on the brief).

PER CURIAM

The order and judgment on May 14, 1985 is affirmed substantially for the reasons expressed by Judge Gibson on April, 25, 1986 with the following reservation. Judge Gibson indicated that a condominium cannot exist at common law and thus is of statutory creation. While it is undoubtedly true that the rights of condominium owners are regulated by statute, we are not necessarily in agreement that at common law prior to the enactment of condominium legislation parties could not create condominiums. However, as we do not regard that statement by Judge Gibson as necessary to his decision it does not impact on our result.

Affirmed.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
COUNTY OF ATLANTIC
Docket No. C-1435-85-E

DERBY ASSOCIATES, a partnership of the State of New Jersey, *Plaintiff*,	:	TRANSCRIPT OF OPINION
vs.	:	
SEASHORE CLUB CONDOMINIUM ASSOCIATION, INC., a corporation of the State of New Jersey; THE BOARD OF TRUSTEES OF SEASHORE CONDOMINIUM ASSOCIATION, INC., and GNOC CORPORATION t/a GOLDEN NUGGET, *Defendants*.	:	Date: April 25, 1985

BEFORE:
L. ANTHONY GIBSON, JSC

APPEARANCES:

GREENBERG, MARGOLIS, ZIEGLER & SCHWARTZ, ESQS.
Attorneys for GNOC & Nugget
By: Martin L. Greenberg, Esq.

MCGAHN, FRISS & MILLER, ESQS.
Attorneys for Plaintiff
By: Patrick McGahn, Esq. and
Howard Drucks, Esq.

FRED P. CAMPO, OCR

THE COURT: Today is the adjourned day of an Order To Show Cause arising out of efforts by the plaintiff, Derby Associates, a partnership of the State of New Jersey, to obtain certain preliminary restraints regarding actions by the defendant, Seashore Club Condominium Association, Inc., and others.

As part of that effort, and as a result of a cross-motion for Summary Judgment which has been filed by the defendant, Seashore Club Condominium, et als, it is necessary for the court to decide whether a recent amendment to the Condominium Act is constitutional.

As part of that same inquiry, the court has also been asked to review a Resolution that was passed by the Condominium Association in September of 1984 which initiated certain steps regarding the termination of the Seashore Club Condominium.

The factual background that gives rise to this particular application and this law suit generally is essentially, at least for present purposes, undisputed. The plaintiff, which as I indicated, is a limited partnership, purchased a condominium unit in the premises known as the Seashore Club here in Atlantic City in June of 1984. The Seashore Club, like a number of condominiums in this City and elsewhere, was formerly a motel consisting, I believe, of one hundred units, primarily, if not exclusively, efficiency units, and was converted to a condominium pursuant to the statutes of the State of New Jersey.

Sometime in the early part of 1984 there was activity between the respective unit owners and the owners of a neighboring casino, the Golden Nugget, regarding the sale of these condominium units with the expectation that if the entire premises of the Seashore Club could be purchased, that it would be used for a certain expansion needed of that casino.

There is some dispute as to who initiated this effort, but it does not matter for purposes of what the court has to decide today. The fact is that the effort was commenced and quite successfully, and negotiations were completed with the overwhelming majority of the unit owners, and at the present time this number has been changed since this law suit was initiated. But it will appear at least eighty-five of the one hundred units have already been titled in the defendant, Golden Nugget, and that

contracts for all of the remaining units except one are expected shortly.

The one remaining unit for which there has been an inability to obtain a contract is the one which is owned by Derby Associates. Derby Associates is also the owner of a parking lot in the same vicinity, and there have been some negotiations between the parties in which an effort has been made to reach a sale of both the condominium unit and the parking lot, but that effort has thus far failed with the position of the parties being significantly apart in terms of price.

On September 3rd, 1984, the Condominium Association met and approved by a majority vote a number of actions that eventually resulted in the revocation of the condominium status of this building, and presumably its sale under the various agreements that were being negotiated with the Golden Nugget. That Resolution also authorized the Board of Trustees to institute litigation against any member of the Association who refused to sign an agreement so that presumably that litigation, if successful, would have achieved the goal of that determination by the Association.

It was also agreed at that time to amend the Master Deed to give the Board of Directors the right to terminate the condominiums upon the vote of eighty percent of unit owners and to authorize the sale, lease, grant or license of the common elements and to permit the disassemblage of some of those common elements, or all of them, as part of that effort.

In January of 1985, the Governor of the State of New Jersey signed legislation which had been passed unanimously by both Houses of the Legislature amending the Condominium Act, and in particular that provision dealing with the steps necessary to complete a revocation of the condominium status. That is N.J.S.A.46:8b-26. Under that amendment whereas there had previously been a requirement of one hundred percent participation by all condominium unit owners in order to achieve a revocation, it would now be possible that such a step could be completed upon the agreement of at least eighty percent of the unit owners.

In completing that legislative step, New Jersey came into line with the recommendations of the National Committee on Uniform Law, and the entity that is active in the condominium field, the name of which I cannot now recall for the moment, but I will mention it later in my Opinion, again being a uniform law group dealing in particular with condominiums. It would appear that the legislative step that was just described was initiated in part, if not in whole, by the efforts of Martin Greenberg as counsel for the defendants and as a result of a recommendation by him to the members of the Senate, and in particular, John Russo, who, I believe, sponsored this legislation. As I mentioned, however, initiated efforts, and the efforts met with unanimous approval of various legislators who were involved in the effort, and that it does, indeed, bring New Jersey into conformity with the recommendations of the group that I mentioned.

This law suit was initiated thereafter in an effort in part to obtain a determination by this court that that legislation was unconstitutional.

Passing from those brief factual elements that bring this matter to the court's attention, let me now identify the legal issues with some additional particularity.

As I have mentioned, the primary issue is the one that seeks a determination regarding the constitutionality of that statutory amendment, and in particular that portion of the amendment that seeks to make its provisions retroactive.

Assuming the court determines that it is unconstitutional, certain consequences flow. Even if the court does not determine that it is unconstitutional, there is a separate question as to whether the Resolution that was enacted by the Association back in September of 1984 was valid and in conformity with the law.

As part of the sub issues involved in the constitutional question, there are a number of things that need to be addressed. Primarily, what needs to be addressed is the assertion by the plaintiff that the retroactive nature of this legislation is unconstitutional under the contract laws of both the federal constitution and the constitution of the State of New Jersey. Those provisions are Article I, Section 10 of the United States Constitution, and Article IV, Section 7, paragraph three of the New

Jersey Constitution. Both of those provisions bear similar language and have basically the same input. Their interpretations are parallel in both state and federal courts.

Basically, those provisions say that the legislature should not pass any law impairing objectives of contracts. The broad language of those provisions, however, is highlighted by the many exceptions that have been developed over the years since those provisions were originally adopted.

The analysis that this court must make of whether those exceptions cover the circumstances before this court require some division of attention between the federal and the state constitutional provisions.

Beginning with the federal constitution, it is, I think, perhaps helpful to mention that the law in this area has changed somewhat over the years and evolve in a way that does have some impact on the approach this court must take to the resolution of this quesiton. Before reviewing that history briefly, however, let me mention what the framework is with which this court begins in assessing these various questions. What I am referring to is the burden that plaintiff has in establishing unconstitutionality. The plaintiff in this case, as in any case who seeks to declare legislation of this state or in any state unconstitutional, bears a heavy burden because the court begins with the strong presumption of constitutionality. This is true whether one is talking about a statute that is prospective in nature, or one which is retroactive as this one.

When the court is dealing with economic and social legislation, which is what that is, it is customary for the court to defer to the legislative judgment that had been made regarding the value and the wisdom of that legislative effort.

New Jersey Courts have long held that all statutes enjoy a strong presumption of constitutionality, and the plaintiff's burden is to establish with clarity that that presumption has been overcome in order to achieve a successful result.

As some of the cases have said, before that presumption can be overcome a court must be satisfied that the balance in favor

of constitutionality is clear and beyond a reasonable doubt. Citations for the proposition that I have just mentioned are numerous, but let me mention some: Raybestos-Manhattan, Inc. v. Glaser, 144 N.J.S. 152, a chancery division case decided in 1970, United Advertising Corporation v. Borough of Metuchen, 42 N.J. 1, The Berkley Condominium case decided by this court, with full citation being The Berkley Condominium Association v. The Berkley Condominium Residences, 185 N.J.S. 313, a chancery decision 1982.

Having stated that framework, let me now pass to the federal case law on this subject. As I indicated, the law has evolved in this area in a way that has some impact on the outcome here. Initially, and even to this day, some distinction has been drawn by the federal case law when dealing with contracts in which a state is a part as opposed to contracts between private individuals. The difference has been one of degree of deference.

The case law that has been cited in this case in oral argument, which I will mention again here today, outlines that development, and I am referring to cases such as Energy Reserves Group, Inc. v. Kansas Power & Light, 103 Supreme Court 697, Allied Structural Steel Co. vs. Spannaus, 438 U.S. 234, (1978) Supreme Court case, and most recently the case of Troy Limited v. Renna, 727 Federal 2d 287, (1984).

The point to be made about that evolution is that with respect to private contracts as opposed to those involving the State itself, or subdivisions thereof, the court has over the years enlarged the degree of deference accorded to the legislative efforts that are made as part of the regulations of what private people can do with respect to contract rights.

I have not mentioned it so far, but probably the turning point in that development was the Blaisdell case, or the case known as Home Building & Loan Association v. Blaisdell, 290 U.S. 398, (1934) case. The other cases that I have mentioned are really the progeny of Blaisdell.

As the court in Troy points out: "Under these post-Blaisdell authorities, the contract clause placed only limited inhibitions on

the ability of state legislatures to address significant social problems by legislation affecting existing contractual undertakings between parties."

The Troy case is also beneficial in taking this court to the so-called three part test that must be examined in order to determine whether or not under the federal contract clause provision, that is the federal constitutional contract clause provision, the presumption previously mentioned has been overcome. And as the court in Troy mentions, the threshhold inquiry under that three-part test is first to determine whether or not the law has operated "as a substantial impairment of a contractual relationship."

If the state law is found to be a substantial impairment, the second inquiry that is required is whether the State has established a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.

Finally, if such a legitimate public purpose is identified, a third query is posed. The next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

That third area has been further refined as follows: "Unless the State itself is a contracting party—" which it is not here in the case before me— "as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."

Passing now to an examination of the three-part test just mentioned, the first judgment that must be made is whether or not the impairment that occurs and is before the court can be considered substantial regarding the contractual relationship effected. If the court determines that that impairment is not substantial, the inquiry ends at that point, and the provisions under inquiry would then be found to have overcome the challenge.

Determining whether the impairment here is substantial, it is necessary to examine what it is that has occurred. And, of course, as can be determined inquiry by examining the oral argument in this case, there can be significant disagreement as to

what, if any significance, has occurred here that would impact on the contractual relationship.

There is a substantial question as to what the contract really is that is being impaired, and whether the contract is being impaired at all, at least as between the contracting parties.

In order to answer this question it is necessary to examine the Condominium Act of New Jersey because the Condominium Act of New Jersey really creates and regulates quite heavily what the purchasers of condominium units can do with their units and can expect in this area. This same regulation, particularly given the breath of it, impacts on other issues the court has to address, but for the moment I mention it because it helps to identify the rights which the parties might have expected to have in this setting, and then determine what of those rights has been lost by this provision, assuming it is enforced.

I will not in this examination attempt to identify everything that the legislation has said can and cannot be done. It is sufficient, I think, to point out that a condominium itself cannot exist at common law. There was no such property right in existence until the legislature of this state said that it did. When the legislature of this state said that it did, it created a hybrid form of property ownership because it combines a number of aspects of communal living with the individual rights that every property owner should traditionally have in a real estate field but with certain, of course, limitations.

For example, in purchasing a condominium unit, although the purchaser obtains a fee interest which is exclusive, that fee interest is subject to a number of communal aspects which control the enjoinment of that fee interest. The common elements are obvious examples and how those common elements are used and the degree to which individual unit owners can enjoy them is a subject which is one which can be changed and frequently is changed by the majority vote of the condominium association which is created as part of that ownership interest.

If this statute is constitutional, therefore, what will be created is that although the unit owner will still have the right to sell, the right to own, and the right to enjoy a particular unit, and will also have the right to receive fair value for that unit in the

case of a sale. What will be lost is the right to refuse to sell in face of overwhelming wishes of the other unit owners within the association of which that unit owner is a part.

The question then is whether that loss is substantial, whether it represents "substantial impairment" under the federal test that I had mentioned.

It is difficult, frankly, to deal with this question in the condominium setting and to attempt to divorce one's self from the traditional notion that we have about ownership in real estate. We traditionally think that among the various rights that one has as an owner of a piece of real estate, includes not only the right to sell it and to obtain fair value for it—I am talking about market value—but there is also the right not to sell.

Many people do not value their ownership interest in a particular piece of real estate by what they can get for it if they sell it, and as has been held by our court over the years, there is a unique quality to real estate that makes it special. And I think that unique quality helps to explain why the same courts have granted specific performance in situations where it would not otherwise be available. The point being that value is not always measured in money. Location, history, other things impact on a person's valuation of the worth of a particular piece of property.

So in that sense a loss through this legislation of that right in face of an overwhelming view of your condominium owner is a significant and substantial loss.

One could question, however, how significant do we measure against the other losses that one assumes when one goes into that type of ownership effort to begin with? And as I have already indicated, this is a highly regulated field, and it is a field where owners are subject to the desires of the majority in a number of significant areas.

I should also mention on this same subject that even in the private real estate field, which this is not, at least not in the classic sense, owners of real estate are not unfettered in their ability to sell or not sell. And dispite the value elements that I have mentioned and as unique as it is, there are many examples of situations that reflect that that is simply not an unfettered right. That right is subject to a number of police power controls

and other private interests. For example, zoning and other police power regulations can affect the manner in which you use your property. It can in some cases destroy that use entirely, subject only to compensation under fair market value.

Such controls, however, have long been held to be constitutional. Ownership of private real estate can begin with others, such as when one owns property as joint tenants or as tenants in common. Although all of the elements that traditionally attach to the ownership fee interest exist in such a setting, a co-tenant can seek and succeed in a partition action and force the sale of that property dispite all of the things that I have mentioned.

I mentioned that backdrop only to put in prospective what I think the reasonable expectation of parties are when they own real estate and when they entered into contracts to purchase it, and I put it out to show that there is a good deal of precedence that impacts on whether the impairment here really is or is not substantial.

In conclusion on this subject, however, although I recognize that a significant and strong argument can be made to the contrary and one that I think that be readily supported, I would nevertheless choose to conclude that the impairment here is substantial. That is that the loss of the right to retain as opposed to sell is a substantial property right, and that the contractual relationship is substantially impaired by its loss. I think the reasonable expectation of the parties would have included that right, and I think it is a substantial right. The fact that the Condominium Act itself had previously contained a reference to that I think underscores this position.

I must confess, however, that in reaching this conclusion I am at least in part influenced by the fact that I am satisfied that the second and third parts of this test can be met, and that the constitutional language on the federal level can be satisfied by the second and third inquiries that are necessary.

I am referring to the fact that I have concluded that there is a legitimate purpose that has been identified by this legislation and that the State has established by the background that is available to me here that there is a significant and legitimate public purpose behind this regulation.

What aided the State of New Jersey in its adoption of the Uniform Act was the experience of others and the broad compensation that has existed in this field by those who expressed opinions on it over the years since the original creation of the concept of condominiums. The various law review articles and academic commentaries in this field have been fairly unanimous in recommending in favor the type of change that New Jersey has adopted by this amendment.

Plaintiff's brief outlines a number of those sources, including a commentary of former Dean Patrick J. Rohan of St. John's University. And in referring to his law review article on the subject in the Columbia Law Review, he also makes reference to the Model Condominium Code, which is a result of an effort by an additional group of people who are active and knowledgeable in this field who likewise have identified that danger and evil that they felt existed when the effort to decondominimize can be restricted by a single or few individuals.

What those commentators had concluded and what the State of New Jersey here concluded was that the danger of enabling a single individual to force the will of the overwhelming majority and to create the act to blackmail all or one co-owner was a danger that justifies the removal in a limited way of the right that I had previously identified. That is the right to decide not to sell.

Given the fact that this is social legislation, the fact that it impacts on economic concerns, triggers a kind of deference that the federal and the state cases refer to. The reasonableness of that judgment has been brought into question here and requires an additional inquiry by the court, and I will speak more to that when I review this question from the point of view of state constitution. For the present purpose it is sufficient to repeat what the court said in Troy and what has been said in the Energy Reserve Group case, and that is as customary in reviewing economic or social legislation the court "properly defers to legislative judgment as to the necessity and reasonableness of a particular measure."

As I will repeat when dealing with this from the prospectus of state constitution, it is important to remember that in examining that question and in exercising that deference the court is not reexamining the issue in a way which would substitute the court's judgment for that of the legislature. The legislature is the appropriate entity for making those judgments and determining whether that choice was or was not reasonable. The scope of review by a court is much more limited and not only begins with the presumption that I have already mentioned, but it also requires that before the court overturns that presumption that it be satisfied that the unreasonableness of that choice be clear, and that the impediment outweighs the benefits clearly, and in some cases say beyond a reasonable doubt.

Whether one approaches this from the state's prospectus or the federal prospectus, I do not think it can be fairly said here that if there is a balance that is unreasonable, that unreasonableness is clear. Certainly it cannot be suggested that the choice was an arbitrary one by the legislature or it was without a factual base. Given the almost unanimity in the literature on this subject, it is difficult to suggest that New Jersey was being arbitrary in choosing to conform to that literature.

Accordingly, it is my judgment that based on the federal constitutional provisions, contract clause of the federal constitution, that the three-prong test has been met in that although I identified a substantial impairment for purposes of this opinion, that impairment was nevertheless outweighed by the other considerations that I mentioned, at least given the standard that I feel applies here.

Let me pass now to the New Jersey Constitution. Under the New Jersey Constitution the approach is not as regimented, but it involves the same type of considerations. The language that has been used by the cases over the years is somewhat different, and when I refer to cases, I am including the case of Gribbons v. Gribbons, 86 N.J.513, Burton v. Sills, 53 N.J.86, and the Berkley case that I referred to earlier and others.

Some of the guidelines that are contained in those cases use labels such as "vested rights, manifest injustice, and fundamental fairness." Those labels, however, are somewhat difficult to apply with great specificity.

Again, what is necessary is identification as a right that is being lost and to look at the balance that was struck between that loss and what the legislature identified as having been gained.

One of the commentaries that has been included in our Supreme Court pronouncement in this area and I think it's worth quoting. The court said on this same subject: "The most that can be said with respect to the proofs is that reasonable men that disagree as to whether the addition of what was at stake there would serve the general welfare. Such policy questions are committed to the judgment of the legislature." And this is a loose quote: "As we have said so many times with respect to zoning and other quasi-legislative decisions, a Judge may not interfere merely because he would have made a different policy decision if the power to decide had been his. A court can concern itself only with an abuse of delegated legislative power and may set aside the legislative judgment only if arbitrariness clearly appeared."

The question then becomes whether or not this court can say that arbitrariness clearly appears here as a result of the judgment made by the legislature of this State and by the Governor of this State in passing the Amendment that I have mentioned.

It is my judgment that such a conclusion cannot fairly be reached. As part of this same inquiry, again reference can be made to the Condominium Act and what the reasonable expectations of the parties would have been. Because when one examines the contract rights and what might be considered "vested" and what loss may be considered as being manifestly unjust, again using one of the labels that is frequently seen, it is again helpful to recognize the heavy regulations that exist in the condominium field and the already existing significant restrictions on the individual rights of property owners in a condominium setting. It is simply a different animal and in some ways bears little resemblance to the classic ownership interests in real estate as it existed over the years.

The definitions that have been used by the commentators in describing what a condominium is helps to identify in part that uniqueness.

As was mentioned in one of the quotes that was submitted by the plaintiff, a condominium is generally defined as an estate in real property consisting of a separate interest in a residential building on such real property together with an undivided interest-in-common in other portions of the same property. In its legal structure a condominium first combines elements from several concepts — unincorporated association, separate property, and tenancy in common — and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other.

That by the way is a quote from 31 CJS Estates, Section 146.

A separate but not too dissimilar quote is contained in a writing of Dean Rohan in the Law Review Article that I previously mentioned.

Included within this point is the observation that when parties enter into contracts to purchase these units they recognize those limitations. Whether they think about them or not, they are presumed to understand them and proceed with full knowledge of them. They are also presumed to understand that given the regulations that they are in and given the fact that the rights that they enjoy are creatures of the legislature and subject to continuing regulations that those rights may be modified from time to time.

One might question this for how realistic permanent expectation can be in the field of condominiums at all, and it is also important I think that assessing what has occurred here to remember that condominiums do not have the same unique qualities as real estate. Although in a sense there is a right not to sell that is common. Cases have identified this lack of uniqueness, including the Sencit Homes Case, which is a case in specific performance where specific performance was denied in the condominium setting, at least in part, because of lack of uniqueness, and as was pointed out by this court in the Berkley condominium case, and that is to say that what can be realistically expected by

contracting parties is significantly impacted by the considerations that I just mentioned, and that is the regulated nature of this field.

In sum, dealing now with the constitutional examination, it is my judgment that the deference that the legislation is entitled to here is one which overcomes and outweighs the concern that otherwise exists on the part of this court with respect to the deprivation of rights that these contract holders had.

It is, again, important to emphasize that in reaching that judgment the strong presumption of constitutionality must be overcome by a clear showing of an abuse, or in the alternative a clear showing of arbitrariness, or a clear showing that the balance struck was so unreasonable as to fail constitutional muster.

I am not satisfied that that burden has been established here, and accordingly I am convinced that this statute and its amendment is indeed constitutional and requires the support of this court.

In reaching that conclusion I do not seek to match my judgment as to what would or would not have been the appropriate balance to be struck by the legislature in reaching this particular position, but rather I defer to that judgment, and also conclude that there has been no showing it is clearly wrong or unreasonable, nor has there been any showing there was not a factual support for the conclusions that were made by the legislature.

Accordingly, the motion for a partial summary judgment that has been pursued by the defendants is granted. That judgment does not, however, end the matter, and in particular a response is required to the question of the bona fides of the resolution of November the 3rd, 1984.

It is my judgment in that regard that that resolution should be stricken as being improper, as being not in conformity with the law as existed in 1984. The determination made then were, in fact, opposed to the legislation that then existed under the Condominium Act insofar as they sought to dissolve or revoke based on eighty percent. Obviously, legislation has now changed. It's retroactivity applies to this contract, and the Condominium Association has agreed to re-examine this question

and to act on the same subject if it chooses to do so, which I assume it will.

Having reached these conclusions, the plaintiff is entitled to certain limited injunctive reliefs pending further action by the Condominium Association. I don't know as a practical matter what that would necessitate beyond that which this court has already done by way of the preliminary order that was entered at the time that this matter was initially before me.

Frankly, I do not think that anything else is required, but I do believe that the Order should continue pending any further action by the Condominium Association, and any further efforts that may be necessary in the way of a judgment of partition if that is required.

In closing, I would like to meet with the attorneys briefly so I can determine what they view to be any remaining attention that the case will require by the court beyond today's hearing.

I also want to mention another observation. That is that there were difficult questions that were involved in this case and I was very much appreciative of the input that I received from counsel. The briefs were very good, and the oral argument I thought was exceptionally good, and I want to compliment both Mr. Drucks and Mr. Greenberg on their presentations because it was very helpful to the court.

Also, on the record, I wish to reserve the right to expand my opinion in the event of an appeal, or convert it to writing if I choose to do so.

* * *

I, Fred P. Campo, an Official Court Reporter of the State of New Jersey, certify that the foregoing is a true and accurate transcript as taken from my stenographic notes.

Date: 5-28-85 /s/ Fred P. Campo

FRED P. CAMPO, OCR

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GOLDEN NUGGET, INC.

DERBY ASSOCIATES, a partnership of the State of New Jersey, *Plaintiff*	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION ATLANTIC COUNTY *Docket No.* C-1435-85E
vs.	:	
SEASHORE CLUB CONDOMINIUM ASSOCIATION, INC., a corporation of the State of New Jersey; THE BOARD OF TRUSTEES OF SEASHORE CONDOMINIUM ASSOCIATION, INC., and GNOC CORP. t/a GOLDEN NUGGET, a corporation of the State of New Jersey, GOLDEN NUGGET, INC., a Nevada Corporation, j/s/a. *Defendant*	:	CIVIL ACTION ORDER AND JUDGMENT

This matter having been opened to the Court by way of Order to Show Cause brought by McGahn, Friss & Miller, Esqs., (Patrick T. McGahn, Jr., Esq. and Howard E. Drucks, Esq. appearing), attorneys for the plaintiff, and by Cross-Motion for Summary Judgment brought by Greenberg, Margolis, Ziegler & Schwartz, P.A. (Martin L. Greenberg, Esq. and Jeffrey D. Light, Esq., appearing), attorneys for defendants, GNOC, Corp. and Golden Nugget, Inc.; Rothenberg, Hyett &

Eisen, Esqs. (Robert Lang, Esq., appearing), attorneys for defendants, Seashore Club Condominium Association Inc., and Board of Trustees of Seashore Condominium Association, Inc., and having considered the papers presented and having heard argument of counsel and for good cause appearing, now, therefore,

IT IS on this 14th day of May, 1985

ORDERED that the application by the plaintiff for a declaration that the retroactive application of P.L. 1985, c. 3, amending N.J.S. 46:8B-26 is unconstitutional is denied and, it is further

ORDERED that the application by the plaintiff for temporary, interlocutory and permanent injunctive relief prohibiting the defendants from filing a Deed of Revocation not containing the signatures of each of the condominium owners, is denied and, it is further

ORDERED that the application by the plaintiff for a declaration that the September 3, 1984 amendment to the Seashore Club condominium Master Deed giving the defendant Board of Directors of the Seashore Club Condominium Association the right to terminate the condominium upon the affirmative vote of 80% of the unit owners is invalid is granted and, it is futher

ORDERED that the Motion for Partial Summary Judgment by the defendants for a declaration that the retroactive application of P.L. 1985, c. 3, amending N.J.S. 46:8B-26, is constitutional, is granted and, it is further

Ordered and adjudged that P.L. 1985, c. 3, amending N.J.S. 46:8B-26 is consititutional.

HON. L. ANTHONY GIBSON, J.S.C.